No. 01-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

ABU-ALI ABDUR'RAHMAN,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Capital Case – Proposed Execution Date: April 10, 2002, 1:00 a.m.

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CAPITAL CASE

QUESTIONS PRESENTED

1. Can the prosecution use a peremptory strike to exclude a prospective African-American juror based on the racial stereotype that he "appeared uneducated," when the prosecution never questioned the juror about his level of education, but when in fact the juror attended college and is an ordained minister?

2. Can the prosecution use a peremptory strike to exclude a college-educated African-American juror for allegedly being of low intellect while seating a white juror whom the prosecution described as "dumb," "not real smart" and a "rough old boy"?

3. Can the prosecution use a peremptory strike to exclude a prospective African-American juror because she allegedly gave "short, cryptic" answers, where such answers were the only way she could respond to complex, leading questions asked by the prosecution?

4. Is Petitioner entitled to relief under the Fourteenth Amendment because the prosecution struck African-American jurors because of race?

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JURISDICTION

The Tennessee Supreme Court's order denying relief was entered on April 5, 2002. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.Const. Amend. XIV: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Abu-Ali Abdur'Rahman was charged with first-degree murder and tried in the Circuit Court of Davidson County, Tennessee. In Mr. Abdur'Rahman's case, the prosecution used three (3) of its five (5) peremptory strikes to remove African-American prospective jurors: Robert Thomas, Sharon Baker, and William Green. With the prosecution having struck these three African-American jurors, Abu-Ali Abdur'Rahman was tried and sentenced to death by a jury containing a single member of his own race, juror Howard[1]. There is clear, undisputed evidence that the prosecution's removal of minority jurors was racially motivated.

A.
THE PROSECUTION'S OWN "RATING" SYSTEM ESTABLISHES RACIAL DISCRIMINATION

The district attorney's notes reveal that the prosecution struck African-American jurors for racially biased reasons. The district attorney notes (which were not available on direct appeal) show that the prosecution rated each juror on a scale from 0-4, with 4 being a score as being the most favorable for the prosecution. See Appendix C (excerpts of prosecution's voir dire notes filed in support of jury discrimination claim). In addition, the prosecution clearly marked in its notes the race of each juror. Id., pp. 1-14.

[1] The population of Davidson County is 23.3% African-American. Between 1978 and July 1987, in Davidson County, there were only seven (7) capital prosecutions in which a jury made a sentencing decision between life and death. All of those defendants were African-American. Abu-Ali Abdur'Rahman was the seventh such African-American to have his fate decided by a jury. Another African-American was seated as an alternate juror but was dismissed before deliberations.

African-American prospective juror Thomas was rated as a "2" by the prosecution. Id., p. 7. The prosecution used a peremptory strike to remove him. Yet the prosecution did not move to strike five (5) white jurors whom they rated as worse jurors, nor five (5) other white jurors whom the prosecution rated equal to Mr. Thomas. The racial motivation behind the prosecution's removal of Mr. Thomas is apparent from the following chart:[2]

Name	Race	Prosecution Rating	Struck By Prosecurtion/Jury?
Thomas	**African-American**	2	**Struck**
Galloway	White	2	Juror
Morgan	White	2	Juror
Meyer	White	2	Juror
Stone	White	2	Juror
Kline	White	2	Juror
Hamblen	White	1	Juror
White	White	1	Juror
Swarner	White	1	Juror
Stoddard	White	0.5	Juror
McAlister	White	0	Juror

Thus, even though the prosecution rated Mr. Thomas as being more acceptable than five white jurors and equally acceptable as five other white jurors, Mr. Thomas was removed from the jury, while those ten white jurors were not removed. The prosecution's own numbers tell the story. One clear explanation exists for this marked disparity – Mr. Thomas was removed because of his race. Though the prosecution proffered non-racial reasons for striking Mr. Thomas, as will be shown infra, those reasons were a pretext for racial discrimination – especially in light of the prosecution's own "rating" system.

[2] The prosecution's ratings of the various jurors are contained in Appendix C: Thomas, p. 7; Galloway, p. 10; Morgan, p. 11; Meyer, p. 2; Stone, p. 4; Kline, p. 8; Hamblen, p. 13; White, p. 5; Swarner, p. 12; Stoddard, p. 3; McAlister, p. 6.

B.
THE PROSECUTION STRUCK AFRICAN-AMERICAN JUROR ROBERT THOMAS BASED ON HIS RACE, INCLUDING THE FALSE RACIAL STEREOTYPE THAT HE WAS "UNEDUCATED" AND OF LOW INTELLECT

1.
THE PROSECUTION OFFERED "REASONS" FOR STRIKING REV. THOMAS

In the trial court, reasons for striking Robert Thomas were offered by Assistant District Attorney John Zimmerman. The Tennessee Supreme Court has previously found some of Zimmerman's actions in this case to be improper and bordering on deception. State v. Jones, 789 S.W.2d 545, 552 (Tenn. 1990). The United States District Court has found that – in this case – Zimmerman withheld exculpatory evidence from the defense. Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1089-1090 (M.D.Tenn. 1998).[3] He has violated Brady in another first-degree murder case. Garrett v. State, 2001 Tenn.Crim.App.Lexis 206 (2001). He has been held in contempt of court for failing to disclose evidence as required by the discovery rules. In Re Zimmerman, 1986 WL 8586 (Tenn.Cr.App. 1986). He has been sanctioned for unethical conduct by the Board of Professional Responsibility. Zimmerman v. Board of Professional Responsibility, 764 S.W.2d 757 (Tenn. 1989).

Zimmerman first asserted that the African-American Robert Thomas was struck because he "appeared uneducated." "Mr. Thomas had given us the appearance that he was an uneducated, not very communicative individual." Tr. 1239. The prosecution continued to try to justify the removal of Mr. Thomas by equating Mr. Thomas' alleged mental disabilities with those of a white prospective juror, Harding, who had described himself as "a slow learner" and a "slow intellectual individual." Tr. 1239. The prosecution contended that "General Bernard and I

[3] Tennessee Supreme Court Justice Birch has recognized that "the evidence of prosecutorial misconduct alleged by Abdur'Rahman is strong. . . ." State v. Abdur'Rahman, No. M1988-00026-SC-DPE-PD (Tenn. Jan. 15, 2002)(Birch, J., dissenting).

expressed concern over Mr. Thomas and Mr. Harding." Tr. 1240. "We wanted both of those individuals off the jury because of their significantly reduced ability to communicate, articulate and . . . reduction in intellect." Thomas was "less in the communicative type skills and the intellect skills." Tr. 1241. As a final reason, Zimmerman also claimed that Thomas was struck because he knew defense counsel Barrett. Tr. 1241.[4]

2.
ROBERT THOMAS WAS STRUCK BECAUSE OF RACE AND THE PROSECUTION'S REASONS WERE PRETEXTS FOR RACIAL DISCRIMINATION

The evidence establishes that Robert Thomas was struck for invidious racial reasons. The proof shows that Mr. Thomas was struck because he is African-American, and that the allegedly race-neutral reasons proffered by the prosecution were mere pretexts to hide clear intentional racial discrimination:

(1) First, the prosecution's initial reason for striking Mr. Thomas – that he "appeared uneducated" – itself establishes that Mr. Thomas was stereotyped as ignorant because of the color of his skin. State v. Tomlin, 384 S.E.2d 707, 710 (S.C. 1989)(violation of Batson where prosecution struck African-American juror based on stereotype that she had a lack of education, and another African-American juror because of racial stereotyping: "the use of such racial stereotypes violates the mandates of Batson").

(2) Second, the truth is that **Mr. Thomas is anything but "uneducated." An African-American from Birmingham, Alabama, Mr. Thomas not only graduated high school, but he completed two years of college, after which he was ordained a minister of the gospel**. See Appendix D (Affidavit of Robert Thomas submitted in support of jury discrimination

[4] As noted *infra*, the Tennessee Supreme Court failed to look at the totality of the circumstances surrounding the exclusion of Thomas, but instead focused on what they perceived to be a valid reason for striking Mr. Thomas. Such a myopic view of the strike is not consistent with the Fourteenth Amendment. As explained *infra*,

claim). **The fact that the prosecution claims they struck Rev. Thomas because he "appeared uneducated" and was of "reduc[ed] intellect" is patently false**. He was struck because he is African-American.

(3) Third, in claiming that Rev. Thomas should be removed because he was "uneducated," the prosecution never asked him any questions about his education, or supposed lack of education. Because the prosecution struck Rev. Thomas for "appearing uneducated" without ever questioning him about his education, it is clear that this alleged reason was a pretext for striking the African-American Thomas because of his race. See e.g., Ex Parte Bird, 594 So.2d 676, 683 (Ala. 1991)(prosecution's failure to question juror on issue used as an explanation for striking a juror suggests that the explanation is a sham).

(4) Fourth, the prosecution was content to seat as a juror a white man (Swarner) whom the prosecution described as "dumb," "not real smart" and a "rough old boy." Appendix C, p. 12. The fact that the prosecution struck Rev. Thomas for allegedly being "uneducated" and ignorant while not striking the "dumb" and "not real smart" Swarner establishes the racism

~~that reason was part of an overall~~ explanation which was explicitly racist, and which therefore cannot justify the exclusion of Mr. Thomas.

behind striking Rev. Thomas.[5]

(5) Fifth, in the prosecution's view, Rev. Thomas was the equivalent of the white Mr. Harding who was "a slow learner" and a "slow intellectual individual." Tr. 1239-1240. The prosecution wanted both of those men off the jury for the same reasons. It is no stretch to say that in the eyes of the prosecution, therefore, a college-educated African-American was the equivalent of an intellectually challenged white man.

(6) Finally, the prosecution's own rating system ties this all together – that system establishes that the African-American Robert Thomas was struck from the jury even though the prosecution considered him better qualified than five (5) white jurors who sat, and equally qualified as five (5) others. See supra.

In summary, therefore, it is clear that Rev. Thomas was struck on the basis of race. The prosecution's assertions to the contrary were pretextual because: (1) The initial (and primary) justification relied upon by the prosecution for striking Rev. Thomas (his appearance as being "uneducated" or intellectually limited) is race-based, false and never the subject of inquiry by the prosecution; and (2) the prosecution's worse treatment of Rev. Thomas vis-a-vis similarly situated white jurors, and their similar treatment of Rev. Thomas compared to less qualified and able white jurors establishes invidious racial discrimination.

[5] In fact, *nowhere* in the District Attorney notes is there any indication that the prosecution ever thought that Rev. Thomas "looked uneducated." The fact that the prosecution never mentioned his "looking uneducated" in their notes indicates that this reason – the prosecution's initial reason for striking the African-American Rev. Thomas – was simply a lie. The falsity of the prosecution's explanation is also confirmed by the fact that there are no written notes that Rev. Thomas is "slow" or "uneducated," but there are numerous notations of other jurors as being intellectually limited. The prosecution was clear to note prospective white jurors who were not smart. See e.g., Appendix C, p. 1 (Geneva Steele: "She has a hard time expressing herself"); p. 5 (George Harding: "not very smart"); p. 6 (Barbara McCrary: "This may all be over her head"); p. 9 (Dudley Sorrells: "not very smart"); p. 14 (Dudley Sorrells: maybe a little slow).

C.
THE PROSECUTION STRUCK AFRICAN-AMERICAN JUROR SHARON BAKER FOR PRETEXTUAL REASONS

The prosecution claimed that prospective juror Sharon Baker was struck because, inter alia, she was allegedly not communicative and gave "short cryptic answers," (Tr. 1237) and "avoided eye contact" with the prosecution. Tr. 1238. The District Attorney notes belie these assertions as valid reasons for striking Baker. The "non-communicative and short cryptic answers" reason reveals the prosecution's true motives.

First, juror Baker was questioned after waiting all day, after which she was "pretty tired." Tr. 213. This explains such alleged "short answers." Second, she was asked numerous leading questions which asked for a "yes" or "no" response. How else would one respond except in short answers? See Tr. 213-220 (prosecution's questioning on voir dire). Third, when not asked leading questions asking for a yes-or-no answer, her responses were not "cryptic," e.g., "I've never really given the death penalty much thought, to be perfectly honest with you, but I can't think of anything offhand that would keep me from going along with it if we found a person guilty." Tr. 217. Fourth, the prosecution did not strike white jurors who, according to the prosecution's notes, were also non-communicative, including white juror Swarner (cited supra) and white juror Steele who had "a hard time expressing herself." See Appendix C, p. 1.

The prosecution's disparate treatment of African-American juror Baker vis-a-vis white jurors Swarner and Stoddard, as well as the prosecution's "short, cryptic answer" reason which is unsupported by the record establishes that Ms. Baker was struck for racially motivated reasons.

D.
THE TENNESSEE SUPREME COURT HAS DENIED RELIEF ON THE BATSON CLAIM BY IGNORING UNDISPUTED EVIDENCE OF RACIAL STEREOTYPING AND THE PROSECUTION'S INVOCATION OF DEMONSTRABLY FALSE REASONS FOR A STRIKE

Because the prosecution's jury selection notes were not previously available when the Tennessee Supreme addressed Mr. Abdur'Rahman's Batson claims on appeal, Mr. Abdur'Rahman filed a motion to recall the mandate in the Tennessee Supreme Court on March 25, 2002. In support of his motion, he attached excerpts of the prosecution's jury selection notes contained in Appendix C to this petition. Mr. Abdur'Rahman asked the Tennessee Supreme Court to grant him relief on his Batson claims and also sought a stay of execution. He maintained that he was entitled to relief, and that the denial of relief would constitute a violation of Fourteenth Amendment due process, because he could not have had his discrimination claims heard on appeal absent the notes, but the notes were not available until after the direct appeal had concluded.

By a 4-1 vote, the Tennessee Supreme Court denied relief. In denying relief, the Tennessee Supreme Court specifically considered the merits of Mr. Abdur'Rahman's Batson arguments:

> Contrary to the position of Abdur'Rahman, the materials presented do not conclusively establish that the racially neutral reasons offered by the prosecution for excusing the African-American jurors were merely pretextual in violation of Batson.

Abdur'Rahman v. State, Appendix A, p. 1. The Court then went into detail explaining why it believed Mr. Abdur'Rahman was not entitled to relief under Batson. Id. **The Court never addressed– and never disputed – the clear facts establishing race discrimination , viz. that Rev. Thomas was struck based on the racial stereotype that he was "uneducated" and of low intellect; that this stereotype was, in fact, false, as Reverend Thomas was college-**

educated; that the college-educated Rev. Thomas was equated with a mentally limited white juror; and that at least one white juror was retained despite his dullness, while Rev. Thomas was struck though he had been to college.

See pp. 5-7, supra.

Having ignored the racial stereotyping of Reverend Thomas and thus believing that Mr. Abdur'Rahman's claims did not establish his entitlement to relief under Batson, the Court thus concluded: "In sum, Abdur'Rahman's contentions furnish no basis for the extraordinary remedy of recall of the mandate." Id. Instead, in denying relief, the Court relied on other allegedly race-neutral reasons for the strikes of the African-American jurors. The Court thus denied Mr. Abdur'Rahman's request for relief: "Accordingly the motion to recall mandate and the motion for stay of execution are hereby denied." Id.

Justice Birch dissented. He acknowledged that Mr. Abdur'Rahman's jury discrimination claim "posits an issue of utmost seriousness, for such racial discrimination is prohibited by the Constitution and has been condemned by the Supreme Court." Appendix C, p. 1 (Birch, J., dissenting). Justice Birch also failed to acknowledge the racial discrimination against Reverend Thomas, but he did agree that Sharon Baker may have been struck for reasons which appeared not to be "honest," and he questioned whether the reasons given by the prosecution were pretextual. Id.

REASONS THIS COURT SHOULD GRANT REVIEW

I. ABU-ALI ABDUR'RAHMAN WAS CONVICTED AND SENTENCED TO DEATH WHERE THERE IS UNDISPUTED EVIDENCE THAT THE PROSECUTION RELIED ON FALSE RACIAL STEREOTYPING WHEN STRIKING JURORS, AND WHERE THE PROSECUTION'S REASONS FOR STRIKING JURORS ARE PRETEXTUAL

"Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." Rose v. Mitchell, 443 U.S. 545, 555 (1979). "Because of the risk that

the factor of race may enter the criminal justice process," this Court has engaged in "unceasing efforts to eradicate racial prejudice from our criminal justice system." McCleskey v. Kemp, 481 U.S. 279, 309 (1987). Here, in a death penalty case involving the first possible execution of an African-American in Tennessee in over 40 years, there is clear evidence that racism has infected the criminal justice system. Certiorari should therefore be granted.

Indeed, Mr. Abdur'Rahman is entitled to relief under Batson v. Kentucky, 476 U.S. 79 (1986). As this Court has explained:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995).

Here, Abu-Ali Abdur'Rahman made a prima facie showing of racial discrimination. He established that he is African-American, and that the prosecution used 3 of 5 strikes to remove African Americans from the jury, leaving only 1 African-American juror to sit in judgment on his case. Where the prosecution uses more than half of its strikes to remove 60% of the African-American jurors – thus leaving only 1 to sit in judgment – the prosecution is required to establish race-neutral reasons for its strikes. See e.g., Purkett v. Elem, 514 U.S. at 766 (Batson inquiry required where prosecution struck two black men from the jury panel); Batson v. Kentucky, 476 U.S. 79, 97 (1986)(pattern of strikes establishes prima facie case of discrimination). Further the disparate treatment of white and African-American jurors (See supra, pp. 6-8) also shows intentional discrimination. Compare Slappy v. State, 503 So.2d 350, 352, 355 (Fla.App. 1987). Thus, the prosecution was required to come forth with race-neutral reasons for striking the jurors.

The prosecution's proffered "race-neutral" reasons were nothing more than pretexts for

intentional discrimination. This becomes apparent when one considers the African-American jurors' ability to serve vis-a-vis the white jurors who actually sat, and (as shown by the District Attorney notes) that white jurors were retained by the prosecution despite identified "shortcomings" which were then articulated by the prosecution as reasons why the African-American jurors had to be struck. Simply put:

> Peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged.

Turner v. Marshall, 121 F.3d 1248, 1252 (9th Cir. 1997), quoting Doss v. Frontenac, 14 F.3d 1313, 1316-1317 (8th Cir. 1994).

As carefully explained supra, pp. 5-8, the prosecution violated this prohibition here, and Abu-Ali Abdur'Rahman is therefore entitled to relief under the Fourteenth Amendment because the prosecution struck Reverend Thomas and Sharon Baker because of their race while using pretextual reasons to try to justify his exclusion. **And the Tennessee Supreme Court simply ignored the racial stereotyping of Reverend Thomas and the patent falsity of the prosecution's reasons relating to his alleged lack of education and limited intellectual ability**. As Mr. Abdur'Rahman explained in his reply in the Tennessee Supreme Court:

> The state does not deny that the prosecution relied on an invidious, false racial stereotype when they struck Robert Thomas because he "appeared uneducated." The state does not defend this racism, for it is indefensible. The state also does not deny that Robert Thomas was struck for racial reasons when the prosecution claimed that he was "non-communicative." Again, the state does not defend this racism, for it is indefensible. Rather, the state suggests that this Court sit idly by and send a man to his death when no one disputes that racism infected the jury selection process.

Appellant's Reply in Tennessee Supreme Court, p. 1 (Filed April 4, 2002). Mr. Abdur'Rahman was correct – neither the prosecution nor the Tennessee Supreme Court has ever denied the use of race to strike Reverend Thomas. Yet the Tennessee Supreme Court has turned a blind eye to

this clear, undisputed racism against Reverend Thomas. It simply ignores it. But ignoring the truth does not change the truth.

Having established that the prosecution relied on racial stereotypes which were false, and having shown that the prosecution's reasons for striking jurors were not based on any notion of the truth, Mr. Abdur'Rahman has established his entitlement to relief under Batson. See e.g., Riley v. Taylor, 277 F.3d 261, 279-283 (3d Cir. 2001)(en banc)(finding Batson violation where prosecution struck blacks for reasons which were not used to strike whites who were left on jury); McClain v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000)("A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge."); Jordan v. Lefevre, 206 F.3d 196, 201 (2d Cir. 2000); Coulter v. Gilmore, 155 F.3d 912, 921 (7th Cir. 1998); Turner v. Marshall, 121 F.3d 1248 (9th Cir. 1997)(disparate exclusion of jurors for reasons not used to exclude whites violated Batson); Devose v. Norris, 53 F.3d 201 (8th Cir. 1995); Davidson v. Harris, 30 F.3d 963 (8th Cir. 1994)("a party can establish that an otherwise neutral explanation is pretextual by showing that the characteristics of a stricken black panel member are shared by white panel members who were not stricken."); Jones v. Ryan, 987 F.2d 960 (3d Cir. 1993); State v. Tomlin, 384 S.E.2d 707, 710 (S.C. 1989)(racial stereotyping in jury selection violated Batson).

The proof thus establishes that African-American jurors were struck because of their skin color. And because of that, Abu-Ali Abdur'Rahman is entitled to relief. Having been shown to have discriminated against African-American jurors, the prosecution cannot try to hide behind any allegedly "racially neutral" reasons to justify their intentional discrimination. Yet the Tennessee Supreme Court has condoned race-based exclusion of jurors by parsing the

prosecution's reasons to latch on to a reason which, had it been articulated as the only reason for striking the juror (knowledge of counsel), might be valid under the Fourteenth Amendment. Such an allegedly racially-neutral reason, however, cannot cure a strike infected by racism.

In fact, courts throughout the Nation have made clear that when one reason for striking a juror is shown to be a pretext for racial discrimination, the other proffered reasons cannot save the prosecution from its violation of the Constitution, for such additional reasons are merely part of a pretextual attempt to justify racism in jury selection. The South Carolina Supreme Court has stated this principle cogently:

> Once a discriminatory reason has been uncovered – either inherent or pretextual –
>
> *this reason taints the entire jury selection procedure.*

Payton v. Kearse, 495 S.E.2d 205, 210 (S.C. 1998)(emphasis supplied).

Other courts have similarly recognized that any pretextual reason proffered by the prosecution vitiates the entire jury selection, because it establishes that allegedly race-neutral reasons for the strike are also pretexts for race discrimination. As the Alabama courts have stated: "[A] race-neutral reason for a peremptory strike will not 'cancel out' a race-based reason." McCray v. State, 738 So.2d 911, 914 (Ala.Cr.App. 1998). So, too, the Texas courts have emphasized that "Even though the prosecutor may have given one racially neutral explanation, the racially motivated explanation vitiates the legitimacy of the entire jury selection procedure." Moore v. State, 811 S.W.2d 197, 200 (Tex.App. 1991). Truly, if the prosecution seeks to hide its racial discrimination by providing any pretextual reason for striking a prospective juror, every reason given by the prosecution must be viewed as having been motivated by trying to hide that

same discrimination.[6]

Moreover, Batson means nothing if the courts allow prosecutors to get away with racial discrimination once proffered reasons are shown to be false or pretextual, and used to disguise actual racial animus:

> To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection Batson provides against discrimination in jury selection.

Payton v. Kearse, 495 S.E.2d at 210.

It is for this reason – to ensure that race plays no factor in convictions and sentences (especially in a capital case, as here) – the courts in numerous states (including Alabama, Arizona, Georgia, South Carolina, Texas, Wisconsin) have ordered relief where any proffered reason for striking a minority juror has been shown to be a pretext for racial discrimination, for that establishes that the juror was struck on account of race. Ex Parte Sockwell, 675 So.2d 38 (Ala. 1995); McCray v. State, 738 So.2d 911, 914 (Ala.Cr.App. 1998); State v. Lucas, 18 P.3d 160 (Ariz.App. 2001); Rector v. State, 444 S.E.2d 862 (Ga. App. 1994); Payton v. Kearse, 495 S.E.2d 205 (S.C. 1998); Moore v. State, 811 S.W.2d 197 (Tex.App. 1991); State v. King, 572 N.W.2d 530 (Wis.App. 1997); United States v. Greene, 36 M.J. 274 (Ct.Mil.App. 1993).

As a matter of policy, this only makes sense. Once the prosecution relies on racial stereotypes and treats African-Americans worse than whites because of race, the harm has already occurred – to the juror, the defendant, and our system of justice. A post hoc attempted

[6] Were this not the law, then prosecutors or defense attorneys could explicitly rely on racist and racially derogatory reasons for striking jurors so long as they also proffered an additional supposed race-neutral reason. Were this the law, jurors could be struck based on articulated reasons such as "I struck him because he was a Dago, and he had been the victim of a crime;" or "She was a Jew, and her brother was a police officer." The criminal justice system cannot sanction such blatant racism. The use of a race-based reason establishes that any other apparently race-neutral reason was pretextual and not the reason for the strike. Compare e.g., Patterson v. P.H.P. Healthcare, 909 F.3d 927 (5th Cir. 1996)(defendant liable for intentional race discrimination); Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984)(where plaintiff called "nigger" by one of defendants, verdict in favor of plaintiff where other arguably legitimate reasons for plaintiff's discharge existed).

justification is just that – an attempted justification for racial animus. Here, it cannot undo the harm that has already occurred to Reverend Thomas, Sharon Baker, Mr. Abdur'Rahman, or our system of justice. The Tennessee Supreme Court, however, clearly overlooked this guiding principle – at the same time it ignored clear evidence of false racial stereotyping and clear racial discrimination.[7]

The prosecution violated the Fourteenth Amendment by striking jurors for racial reasons and providing pretextual justifications for such discrimination. Where undisputed racism has infected the jury selection, Abu-Ali Abdur'Rahman is entitled to relief under the Fourteenth Amendment, and this Court should grant the petition for writ of certiorari to remedy this injustice.

II. THE ISSUE IS WORTHY OF REVIEW IN LIGHT OF Miller-El v. Cockrell, 261 F.3d 445 (5th Cir. 2001), cert. granted 534 U.S. ___ (2002)(No. 01-7662) IN WHICH THIS COURT IS CONSIDERING THE APPLICATION OF Batson TO JURY SELECTION IN CAPITAL CASES

This Court has granted certiorari in Miller-El v. Cockrell, 261 F.3d 445 (5th Cir. 2001), *cert. granted* 534 U.S. ___ (2002)(No. 01-7662) to review the proper standard for determining whether the prosecution has overcome a capital defendant's prima facie showing that jurors have been struck because of their race. See Miller-El v. Cockrell, 535 U.S. ___ (2002)(amending order granting certiorari to include question whether lower court properly reviewed claim of racial discrimination in selection of petit jury). The same issue is presented in this case. The lower court has denied relief by applying a standard that is inconsistent with this Court's Fourteenth Amendment jurisprudence. Just as the racial discrimination in Miller-El calls out for

[7] More fundamentally, if the prosecution actually relied on an allegedly valid reason here, why didn't they simply invoke such a reason by itself? The prosecution didn't do so precisely because they were trying to hide their racism by fabricating the White-Black comparison between Rev. Thomas and Mr. Harding and by making up other lies to make it appear that they weren't acting with racism. By protesting too much, the prosecution revealed their true racial motivation. The racial discrimination is therefore akin to that which occurred in Amadeo v. Zant, 486

a remedy, that same racial discrimination requires a remedy here.

The grant of certiorari in Miller-El establishes that the petition in this case is worthy of review as well. Accordingly, this Court should either: (1) grant the petition; (2) grant the petition and consolidate this case with Miller-El; or (3) hold the petition pending the decision in Miller-El, and afterwards grant the petition, vacate the judgment, and remand for further proceedings in light of Miller-El.

III. THIS CASE IS VIRTUALLY INDISTINGUISHABLE FROM Tompkins v. Texas, 490 U.S. 754 (1989), IN WHICH THIS COURT GRANTED REVIEW TO ASSESS THE PROPER APPLICATION OF Batson TO JURY SELECTION IN CAPITAL CASES

Finally, the petition should be granted because, on its facts, this case is virtually indistinguishable from the case of Tompkins v. Texas, cert. granted 486 U.S. 1004 (1988), aff'd by an equally divided court, 490 U.S. 754 (1989). In Tompkins, the prosecution struck two African-American jurors, Thomas and Samuel. The prosecution struck juror Thomas for allegedly not being able to understand or apply the law of circumstantial evidence – even though the case ultimately did not involve circumstantial evidence. See Brief of Petitioner, Tompkins v. Texas, U.S. No. 87-6405 (Available on Lexis). The prosecution also struck juror Samuel because, allegedly, he "could not read and write," – even though, in reality, Samuel was literate. Id. In Tompkins, this Court granted certiorari to review the validity of the prosecution's reasons for striking the African-American jurors.

The parallels between Mr. Abdur'Rahman's case and Tompkins are striking. In Tompkins, juror Samuel was struck on factually untrue assertions about his mental inabilities. This is exactly what has occurred here with Reverend Thomas. See pp. 5-6, supra. Similarly, in Tompkins, juror Thomas was struck for his alleged inability to understand the case – when white jurors who had less ability to understand the case were not struck by the prosecution. This, too, is

U.S. 214, 218 (1988), in which state officials discriminated against African-Americans in the selection of juries, but

exactly what occurred here. See pp. 6-7, supra.

In both Tompkins and this case, therefore, African-American jurors were struck for racially discriminatory reasons; African-American jurors were struck because they were falsely accused (in a stereotypical way) of being ignorant or unable to understand the case; African-American jurors were treated significantly more harshly than equally-qualified or less-qualified white jurors; and the prosecution in both cases provided pretextual reasons for their strikes. Just as certiorari was warranted in Tompkins, certiorari is warranted here – in order to review the lower court's application of Batson to racial discrimination in the selection of the capital jury, and to remedy the denial of equal protection which has occurred.

tried to hide their discrimination through ruses.

CONCLUSION

The petition for writ of certiorari should be granted. Alternatively, this Court should hold the petition pending the decision in Miller-El v. Cockrell, 261 F.3d 445 (5th Cir. 2001), cert. granted 534 U.S. ___ (2002)(No. 01-7662) and afterwards, grant the petition, vacate, and remand for further proceedings in light of Miller-El. This Court should also grant a stay of execution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari has been served via first-class mail postage prepaid upon counsel for the Respondent, Office of the Attorney General, State of Tennessee, 425 Fifth Avenue North, Nashville, Tennessee 37243 this ___ day of April, 2002.

_____

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D